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## **Judicial Review of Administrative Action in the United Kingdom: The Status of Standards Between 1890 and 1910**

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# JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE UNITED KINGDOM: THE STATUS OF STANDARDS BETWEEN 1890 AND 1910

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## *Abstract*

This paper analyses judicially developed standards for reviewing administrative actions in the United Kingdom between 1890 and 1910. By exploring the context, reach, types and frequency of judicial review during that timeframe – fin de siècle – this historical analysis reveals both significant changes and significant continuities by comparison with twenty-first century standards.

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## 1. Introduction

The United Kingdom ('UK') as it existed between 1890 and 1910 ('the relevant timeframe') was in some ways very different and in other ways very similar to modern times in respect of judicial standards for reviewing administrative actions. Charting such change and continuity makes historical legal research on this topic a uniquely important type of scholarship. An uncontested historical account can, for example, operate as a source of further constitutional continuity; whereas a contested history can stimulate debates which may lead to change<sup>2</sup>. In spite of its importance, historical legal analysis centred primarily on the empirical study of judicial decisions, as this paper does, is somewhat scarce. A contextual backdrop situating that analysis in its broader historical setting is provided in the first and second sections which follow this introductory paragraph. Most of the remainder of the paper focuses on key law reports printed during the relevant timeframe which disclose evidence about judicial thinking in relation to administrative law questions concerning the appropriate reach and various types of review. A short section detailing a separate quantitative analysis on the frequency of administrative law cases decided by UK courts during the relevant timeframe follows these enquiries, preceding some concluding remarks on the findings of the paper as a whole.

## 2. The Historical Context

The UK itself was constituted somewhat differently in the late nineteenth and early twentieth centuries, namely as the United Kingdom of Great Britain and Ireland<sup>3</sup>. Moreover, variances between the constituent nations of the UK as it then was calls for an immediate word of warning to readers of this paper. The focus herein is on the state of administrative law in England

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<sup>2</sup> J. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (2007) 40.

<sup>3</sup> Great Britain then comprised, as it does today, the three nations of England, Scotland and Wales. Only the six counties comprising what would come to be known as Northern Ireland would remain in the Union subsequent to the Government of Ireland Act 1920 and the Irish Free State (Constitution) Act 1922.

and Wales within the relevant timeframe<sup>4</sup>. This means that distinctive traits of the Scottish legal system, in particular, are generally treated with the same 'respectful silence' other writers have felt compelled to use in order to avoid misrepresentation or trivialisation of that system arising from limitations of time and resources<sup>5</sup>. It can be noted briefly, nonetheless, that the Scottish system of judicial review evolved differently from that of the English system in several significant respects. While the grounds of review which developed in the Scottish system closely resembled those that developed in England and Wales, for example, where such grounds could be established the Scottish Court of Session exercised its supervisory jurisdiction by way of general remedies which were likewise available in private law actions (namely reduction; declarator; suspension and interdict; specific performance and specific implement) rather than by way of special public law remedies akin to the prerogative writs (certiorari; prohibition; mandamus) recognised in England and Wales<sup>6</sup>. Consequently, it has been suggested that:

....whereas in English law the three prerogative orders enabled the court to exercise an integrated supervisory jurisdiction in the public law field, in Scotland it has not been possible by reference to judicial remedies alone to identify a distinct branch of judicial practice; nor has the law in Scotland been

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<sup>4</sup> Stephen Sedley describes public law in England and Wales as having been 'effectively uniform' as of when the two countries were unified by legislation in the sixteenth century, at least until the coming of devolution in 1998: S. Sedley, *Lions under the Throne: Essays on the History of English Public Law* (2015) 1. The jurisprudence of England and Wales is also commonly assumed to have been mirrored by judges across the Irish Sea during the relevant timeframe. Given that the remit of this study meant it was not possible to conduct a systematic comparison of the law reports for Ireland (or Scotland) and those for England and Wales, the verification of that assumption has had to be parked for another occasion.

<sup>5</sup> Ibid.

<sup>6</sup> A. Bradley and C. Himsworth, *Administrative Law*, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, 2000 Reissue, at para 4.

dominated, as has often been the case in England, by the restraints of a remedy-based system<sup>7</sup>.

The character of English judicial practice and the restraints of the prerogative writ system will be explored in greater detail below, but for now let it suffice to note that even within the UK it is arguable that the extent to which there existed a ‘common core’ of administrative law during the relevant timeframe is uncertain.

While the UK Parliament had established its legislative supremacy as a consequence of the constitutional struggles in seventeenth century England, public administration was of course carried on by government delegates of one sort or another. Justices of the peace, who once functioned as ‘all-purpose administrative authorities’, gave way over time to a more diversely labelled array of administrators such as councils, boards, commissioners, authorities and so on<sup>8</sup>. Subsequent to the abolition of the Star Chamber (an executive-controlled body closely associated with the arbitrary rule of the Stuart monarchy)<sup>9</sup> and a substantial reduction in the powers of the Privy Council (an order of noblemen from whom the reigning monarch took advice) resulting from the Glorious Revolution<sup>10</sup>, common law courts ‘stepped into the breach’ and assumed a supervisory role over public administrators<sup>11</sup>. A major consequence of the Stuarts’ failed attempt to remove government affairs from common law jurisdiction was to create ‘an all but invincible prejudice against encroachments upon the province annexed by the common-law courts in the field of public law’ which was buttressed by ‘the exceptional degree of public esteem earned by the superior judges’

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<sup>7</sup> Ibid. For further discussion on the distinctive development of judicial review in Scotland, see C. Himsworth, *Judicial Review in Scotland*, in B. Hadfield (ed.), *Judicial Review: A Thematic Approach* (1995); L. Clyde and D. Edwards, *Judicial Review* (1999).

<sup>8</sup> W. Wade and C. Forsyth, *Administrative Law*, 10th ed. (2009) 11-12.

<sup>9</sup> S. Galeotti, *The Judicial Control of Public Authorities in England and in Italy: A Comparative Study* (1954) 28.

<sup>10</sup> An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly Called the Star Chamber (16 Car I c 10). For a detailed discussion about the historical evolution and present day roles of the Privy Council, see: D. Rogers, *By Royal Appointment: Tales from the Privy Council – The Unknown Arm of Government* (2015).

<sup>11</sup> W. Wade and C. Forsyth cit. at 8, 12.

who had established their independence of the executive<sup>12</sup>. This sequence of historical events became constitutional in the sense that they operated as a 'permanent obstacle to any development of a dual system' of courts resembling those which flourished elsewhere in Europe<sup>13</sup>. A similar sort of prejudice was later effectuated by Diceyan insularity, which will be addressed further in due course.

In the absence of specific legislation passed for the purpose of delimiting the role of the courts in their supervisory role, and the related absence of a specially designated administrative court system, the ordinary courts incrementally developed their own supervisory jurisdiction over a new range of administrative authorities in the UK. The main exception to this general tendency of the legislature to leave the courts to their own jurisdictional devices is the relatively significant structural reform which occurred in the 1870s. The ancient courts of common law, chancery, admiralty, probate and divorce were all supplanted by a Supreme Court of Judicature which was sub-divided into a High Court of Justice and a Court of Appeal<sup>14</sup>. The High Court of Justice consisted of divisions that closely corresponded to the older courts which it replaced, though 'all three divisions were empowered to dispense law and equity alike'<sup>15</sup>. Thus, while the Chancery Division continued to administer a familiar jurisdiction, the new Queen's Bench Division 'amalgamated the once disparate common law jurisdictions of the King's Bench, Exchequer and Common Pleas' – though this amalgamation did not take effect 'until the chief justices of the erstwhile separate courts had retired' in 1881<sup>16</sup>. The newly constituted Court of Appeal subsumed jurisdiction over matters which had previously been held by a range of appeal courts<sup>17</sup>. The creation of this court, among other things, called into question the future of the appellate jurisdiction of the House of Lords, which would have been abolished were it

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<sup>12</sup> J. Evans, *De Smith's Judicial Review of Administrative Action*, 4th ed. (1980) 5-6.

<sup>13</sup> S. Galeotti cit. at 9.

<sup>14</sup> Judicature Acts 1873-1875.

<sup>15</sup> S. Anderson, *Public Law*, in W. Cornish and others (eds.), *The Oxford History of the Laws of England: Volume XI: 1820-1914* (2010) at 525.

<sup>16</sup> T. Watkin, *The Legal History of Wales*, 2nd ed. (2012) 171-172.

<sup>17</sup> Judicature Acts 1873-1875.

not for considerable conservative opposition to the proposal<sup>18</sup>. In the end, a ‘double appeal’ system was retained; first to the Court of Appeal, then to the House of Lords. Thus, as Baker points out, while ‘the court established under the 1873 Act kept the name *Supreme Court of Judicature*’, its supremacy had been ‘snatched from it before birth’<sup>19</sup>. By way of a compromise between reformers and traditionalists, the judicial House of Lords which in fact topped the court hierarchy was, from 1876, staffed by professional judges styled as ‘Lords of Appeal in Ordinary’ who sat in the House in a non-parliamentary capacity<sup>20</sup>. It should be noted, however, that while judicial sittings took place separately from parliamentary sittings at this time, the formal Appellate Committee of the House which prefigured the UK Supreme Court that exists today was not established until 1948 and thus after the relevant timeframe<sup>21</sup>.

The contentious and radical rationalisation of court structures set out above stands in stark contrast to the legislative vacuum in which the interconnected procedures and standards for judicial review had developed by the relevant timeframe, and which remained untouched by legislative intervention throughout it. It is unsurprising, therefore, that there is a broad consensus among legal historians as to the fact that the substantive law of judicial review blossomed primarily within the confines of an ancient procedural framework inherited by the common law courts of several generations<sup>22</sup>. The writ system is of course the procedural framework in question, and a short summary of its

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<sup>18</sup> R. Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (1979) at ch 2; D. Steele, *The Judicial House of Lords: Abolition and Restoration 1873-6*, in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876-2009* (2009).

<sup>19</sup> J. Baker, *An Introduction to English Legal History*, 3rd ed. (1990) 163.

<sup>20</sup> Appellate Jurisdiction Act 1876; R. Stevens cit. at 18.

<sup>21</sup> J. White, *The Judicial Office*, in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876-2009* (2009) at 36. On the constitution of the current UK Supreme Court, see: Constitutional Reform Act 2005, Pt 3; A. Le Seur, *From Appellate Committee to Supreme Court: A Narrative*, in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876-2009* (2009).

<sup>22</sup> See, for example: E. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (1963) 1-2; P. Craig, *Administrative Law*, 8th ed. (2016) 4.

provenance is a necessary precursor to any informed analysis of how judicial standards for review developed.

Writs were originally sealed royal orders issued by the monarch in order to, for example, serve notices or demand information<sup>23</sup>. Dissatisfied royal subjects could initially petition the King directly to complain of injustices resulting from decisions made by the courts within his realm, hoping that the King might then decide to exercise his prerogative to issue remedial writs to those courts<sup>24</sup>. By the twelfth century royal interventions of this nature ceased to be available from the King personally and were instead issued indirectly via the King's Court, and by the mid-thirteenth century the categories of writ which were available from the King's Court had ossified into an exhaustive Register of Writs<sup>25</sup>. The inflexible formality created by these procedural strictures meant that writs once obtainable for certain distinct purposes had to be creatively adapted by the courts of common law in order to serve different purposes, so as to protect new public interests brought about by changed societal conditions. As such, long before the advent of the industrial age closely preceding the relevant timeframe, the writ system had been transformed into a judicial apparatus for reviewing previously unimaginable government responsibilities for administering public functions relating to factories, welfare, railways and public health, among others<sup>26</sup>. The particulars of what had come to be classed as the main 'prerogative writs' of certiorari, prohibition and mandamus will be discussed at more appropriate junctures below, but it is of historical significance that each of those common law remedies had developed largely in isolation from one another, only coming to be grouped together over a century after they had acquired their respective 'prerogative characteristics'<sup>27</sup>. Prerogative characteristics were retrospectively exemplified by those discretionary remedies which judges sitting primarily on the King's Bench would issue where a recognised cause could be established, according to the demands of justice

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<sup>23</sup> H. Woolf and others (eds.), *De Smith's Judicial Review*, 7th ed. (2016) at 857.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*

<sup>26</sup> P. Craig cit. at 22, 36-39.

<sup>27</sup> H. Woolf and others (eds.) cit. at 23, 858-860.



which certain royalist judges had been keen to associate with the King's benevolence towards his subjects<sup>28</sup>.

In tandem with these advances towards administrative oversight within the common law court system, there developed in Chancery two equitable remedies – firstly, injunctions; and subsequently, declarations – which by the relevant timeframe had assumed some complementary importance in respect of administrative actions. Their particulars, as with the prerogative writs, will be extrapolated in greater detail below. For now, the relative adaptability of equitable remedies as compared with 'the labyrinthine by-ways of the common law prerogative writs' is highlighted in advance<sup>29</sup>. The particular flexibility of injunctions, which had their origins in what would now be termed private law disputes, were easily adapted as a means of reviewing administrative authorities who encroached upon property rights<sup>30</sup>. Considerably restrictive court practices evolved, however, so as to prevent the ordinary citizen from seeking injunctions against administrative actions or inactions without the Attorney General's fiat in many circumstances<sup>31</sup>. It is likewise important to note by way of background that declaratory judgments were heavily opposed by the judiciary for a long period of time immediately prior to the relevant timeframe. In the 1877 case of *Hampton v Holman*, for instance, the then Master of the Rolls resolutely affirmed that 'where the Court is asked to do nothing more than to declare future rights, it is clear that the Court will not make any declarations as to future rights'; despite arguments in favour of relaxing that rule having been put to him by counsel<sup>32</sup>.

### 3. The Ahistorical Context

The foregoing account on the shaping of constitutional and procedural structures within which administrative law developed prior to the relevant timeframe typifies the inescapably haphazard nature of its history in the UK, a quality which is equally discernible from the relevant timeframe itself. Disentangling the

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<sup>28</sup> *ibid.*

<sup>29</sup> H. Woolf and others (eds.) cit. at 23, 875.

<sup>30</sup> S. Galeotti cit. at 9, 31.

<sup>31</sup> J. Evans cit. at 12, 430-433.

<sup>32</sup> *Hampton v Holman* (1877) 5 Ch D 183, 187.

vast store of 'uncoordinated judicial activity'<sup>33</sup> which might be said to have constituted a body (in this sense analogous, perhaps, to the body of Frankenstein's monster) of administrative law within the relevant timeframe is thus, as will soon become clear, a difficult and necessarily selective task. Before embarking upon that task, however, one more preliminary issue must be addressed. An ahistorical impression of administrative law in the UK as it was within the relevant timeframe abounds in various contexts due to the regrettable influence of Professor Albert Venn Dicey's pernicious claim that none did or should exist<sup>34</sup>.

Dicey's claim was fuelled by a 'fallacious comparison' with the specialised administrative courts of France which, he mistakenly alleged, conferred 'a whole body of special rights, privileges, or prerogatives' on government officials and was thus incompatible with his conception of the rule of law<sup>35</sup>. This was because Dicey's conception of the rule of law was premised, in part, on the idea that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'<sup>36</sup>. Law reports of the time provide abundant evidence, however, demonstrating that the English judiciary had developed 'a system of judicial supervision of public administration closely paralleling the jurisdiction of the French Conseil d'État, itself a powerful and independent tribunal, albeit constitutionally part of the administrative structure' by cleverly adapting the common law and equitable remedies available to them<sup>37</sup>, as explained in the previous section of this report and explored further in the sections which follow this one. That is to say nothing of the many other critiques which have been levelled at Dicey's thesis, such as its failure to address the extensive immunities from 'ordinary law'

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<sup>33</sup> G. Drewry, *Judicial Review: The Historical Background*, in M. Supperstone, J. Goudie and P. Walker (eds.), *Judicial Review*, 5th ed. (2014) 13.

<sup>34</sup> A. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at ch 5. Note that Dicey also published a second (1886) and third (1889) edition of his text prior to the relevant timeframe; a fourth (1893), fifth (1897), sixth (1902) and seventh (1908) edition during the relevant timeframe; and his final, eighth (1915) edition was published shortly after the relevant timeframe.

<sup>35</sup> W. Wade and C. Forsyth cit. at 8, 20.

<sup>36</sup> A. Dicey cit. at 34, 177-178.

<sup>37</sup> S. Sedley cit. at 4, 64.

enjoyed by various public officials<sup>38</sup>. It is widely believed that Dicey's 'xenophobic antipathy to France and to civil law systems, which he regarded as autocratic and Napoleonic' blinded him to the historically undeniable existence of English administrative law during his lifetime<sup>39</sup>. There are some scholars, however, who credit Dicey for having indirectly influenced the shifting of the UK constitution in a 'civil administrative direction' by stimulating others to correct his revisionist and neglectful accounts of the administrative landscape in its institutional, remedial and theoretical guises<sup>40</sup>.

At least two related consequences which are significant to the present study flowed from Dicey's denialism in respect of administrative law in the UK. The first is that Dicey's heritage is said to have engrained a culture of disengagement with the subject of administrative law by generations of lawyers and judges influenced by his ahistorical doctrines. It is claimed by some writers, for example, that his influence was responsible for a rise in judicial deference in respect of judicial supervision over administrative actions in the ensuing decades<sup>41</sup>. Secondly, Dicey's glorification of the English model is thought to have considerably affected the level of insularity which prevailed in the wake of his scholarship. That is to say, Dicey's method inculcated a culture of superiority in the UK by presenting different jurisdictions 'not as actual or potential sources of influence, but as anti-models with which to demonstrate the peculiarity of ... his analytical scheme of the English law of the constitution'<sup>42</sup>. The temporary prominence of Dicey's denialism thus resulted in an unwarranted distinction between the UK and other European legal systems, which appears to have impeded any significant reference to those systems in the UK courts as they each grappled with much the same issues of administrative law.

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<sup>38</sup> H. Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business*, 17 Osgoode Hall Law Journal 1 (1979) 6.

<sup>39</sup> S. Sedley cit. at 4, 270.

<sup>40</sup> J. Allison, *The Spirits of the Constitution*, in N. Bamforth and P. Leyland (eds.), *Accountability in the Contemporary Constitution* (2013) 36-45.

<sup>41</sup> G. Drewry cit. at 33, 18. Drewry refers to commentators who depict *Local Government Board v Arlidge* [1915] AC 120 as being symptomatic of the alleged increase in judicial deference resulting from Dicey. This point will be briefly revisited below.

<sup>42</sup> J. Allison cit. at 2, 9.

#### 4. The Reach of Judicial Review

The messy nature of UK administrative law history adverted to above makes it possible to analyse courts during the relevant timeframe with reference to a variety of possible considerations, such as:

...the classes of factual situations in which their jurisdiction may [have been] invoked, the purposes for which that jurisdiction must or may [have been] invoked, the forms of proceedings in which it [was] invoked, the nature, characteristics and effects of the remedies and sanctions they may [have awarded], and the conditions that [had to be] satisfied before any form of judicial relief or particular remedies and sanctions [were] obtainable<sup>43</sup>.

To avoid an 'intolerably prolix and repetitive' analysis<sup>44</sup>, however, this paper eschews the temptation to deal with all possible viewpoints exhaustively and instead dwells on two specific perspectives which encompass a good range of pertinent material. The reach of judicial review during the relevant timeframe is the first of these perspectives and forms the focus of this section, while the types of judicial review available during the relevant timeframe is the second perspective and is dealt with hereafter. The reach of judicial review is an expression intended to refer to the legal gateways through which individuals could request judicial intervention in respect of administrative actions, as well as both the credentials required of individuals likely to be granted such requests and the characteristics of administrative authorities which judges did and did not recognise as being subjectable to review. By virtue of the remedy-based system which had developed by the relevant timeframe, the reach of review was inherently limited by the purposes for which each judicial remedy had developed, in addition to the enduring issues of standing and amenability. These issues will now be considered with regard to

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<sup>43</sup> J. Evans cit. at 12, 21-22. See also: S. De Smith, *Wrongs and Remedies in Administrative Law*, 15 Modern Law Review 189 (1952) 189-190.

<sup>44</sup> J. Evans cit. at 12, 22.

each of the main remedies in turn, followed by a short critical overview of their collective coherence.

#### 4.1 Prohibition and Certiorari

The writs of prohibition and certiorari developed independently of each other and although they had come to be very similar in scope by the relevant timeframe, their separate origins did result in some notable distinctions. Prohibition, the oldest of the prerogative writs, was devised primarily in order to prospectively limit the jurisdiction of ecclesiastical courts<sup>45</sup>, but came to be used as a common method of prospectively reviewing administrative authorities<sup>46</sup>. By the relevant timeframe, the purpose of the writ was understood to be for the protection of ‘the prerogative of the Crown and the due course of the administration of justice’; which was effectuated ‘by prohibiting [an] inferior Court from proceeding in matters as to which it [wa]s apparent that it ha[d] no jurisdiction’<sup>47</sup>. Indeed, the Court of Appeal confirmed that prohibition was demandable as of right, in contrast to the entirely discretionary nature of both certiorari and mandamus, where lack of jurisdiction was apparent from the face of the proceedings<sup>48</sup>. Prohibition remained discretionary, however, in cases where want of jurisdiction was ‘latent’ rather than ‘patent’<sup>49</sup>. Other judges put the same point a different way, by referring to an apparent distinction between ‘total’ and ‘partial’ want of jurisdiction<sup>50</sup>. Certiorari, on the hand, had its origins as a royal demand for information by way of certification<sup>51</sup>. By the relevant timeframe, it had become a means of removing an order already made by an inferior court into the King’s or Queen’s Bench, where it could be quashed for want of jurisdiction. This definition highlights a further distinction, namely that while

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<sup>45</sup> For an example from the relevant timeframe, see: *R v Tristram and Another* [1902] 1 KB 818.

<sup>46</sup> J. Baker cit. at 19, 166.

<sup>47</sup> *Farquharson v Morgan* [1894] 1 QB 552, 556.

<sup>48</sup> *ibid.*

<sup>49</sup> *Farquharson v Morgan* [1894] 1 QB 552, 557.

<sup>50</sup> *Farquharson v Morgan* [1894] 1 QB 552, 564, citing *Jones v Owen* (1845) 5 D & L 669.

<sup>51</sup> J. Baker cit. at 19, 170-171.

prohibition would lie against the decision of a court with its own special jurisdiction, such as an ecclesiastical court, certiorari would only lie against an inferior court administering the same temporal law as judges of the King's or Queen's Bench<sup>52</sup>. However the most obvious difference between the two writs was of course the appropriate time at which they might be sought. Prohibition was better suited to reviewing activities at an earlier stage than certiorari, given its preventative purpose, whereas the quashing effect of certiorari was more likely to be sought at a later stage either in isolation from<sup>53</sup>; as an alternative to<sup>54</sup>, or in conjunction with<sup>55</sup> prohibition.

The rules about whom could avail of these two writs were also very similar but marginally distinguishable. Two contrasting views had developed by the relevant timeframe as regards the standing requirements for prohibition. Some judges distinguished between the availability of prohibition to individuals who were personally unaffected by the matter about which review was sought and its availability to the party aggrieved by the alleged want of jurisdiction on which an application for review was made<sup>56</sup>. Only in the latter case would locus standi cease to be a matter of discretion for the court and issue *ex debito justitiae*.<sup>57</sup> Other judges regarded it as their general duty to guard against excesses of jurisdiction and would thus accept requests for review from anyone at all, whether they were directly affected by the matter at hand or a total stranger to it<sup>58</sup>. During the relevant timeframe this difference of views appears to have been determined in favour of the former approach by the case of *Farquharson v Morgan*, wherein the Court of Appeal indicated that if there existed judicial discretion about whether to award prohibition – as a result of latent, rather than patent, want of jurisdiction – matters such as laches or misconduct on the part of

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<sup>52</sup> The accuracy of this point was confirmed in *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White* [1948] 1 KB 195.

<sup>53</sup> *R v Carter and Another* [1907] 1 KB 298.

<sup>54</sup> *Gozney v Bristol Trade and Provident Society* [1909] 1 KB 901.

<sup>55</sup> *R v His Honour Judge Snagge and Others* [1909] 1 KB 644.

<sup>56</sup> *Forster v Forster and Berridge* (1863) 122 ER 430, 435.

<sup>57</sup> *ibid.*

<sup>58</sup> *Worthington v Jeffries* (1875) LR 10 CP 379, 382.

the applicant could influence a court's decision whether to grant prohibition<sup>59</sup>.

There seems to have been less tension between competing judicial views as regards the standing requirements for certiorari, with the weight of judicial opinion falling firmly in favour of an approach requiring some sort of interest in the proceedings about which review was sought in all circumstances. The leading case in this respect is *R v Nicholson*, in which it was held that certiorari could be refused where an applicant failed to show they had 'a peculiar grievance of their own beyond some inconvenience suffered by them in common with the rest of the public'<sup>60</sup>. In addition to allowing certiorari to be refused where no particularised grievance could be established, the court also held that 'no sufficient ground for the issue of the writ' would exist where an applicant had only a 'small' interest in the matter at hand<sup>61</sup>. The theoretical difference between locus standi for prohibition and certiorari thus appears to have been that where a patent excess or abuse of jurisdiction could be established, prohibition would be issued as of right whereas certiorari would only ever lie if the applicant had some personal interest in the determination of the issue<sup>62</sup>. That having been said, subsequent cases within the relevant timeframe suggest that judges interpreted the latter requirement liberally. Thus in the case of *Cobbold*, for example, certiorari was granted to applicants who were 'only rivals in trade' with the individual to whom an alehouse licence had been granted<sup>63</sup>. Lord Alverstone CJ held that 'it would be too strong to say that [the rival brewers] had not a sufficient interest in the matter to enable them to apply'<sup>64</sup>. The degree to which apparently restrictive judicial theories were reflected in ostensibly liberal judicial practices as regards the locus standi requirements for these remedies is therefore open to some doubt.

Certain statutes in force during the relevant timeframe provided that the proper mode of challenging a new authority

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<sup>59</sup> *Farquharson v Morgan* [1894] 1 QB 552, 559.

<sup>60</sup> *R v Nicholson* (1899) 2 QB 455, 471.

<sup>61</sup> *R v Nicholson* (1899) 2 QB 455, 472.

<sup>62</sup> S. Galeotti cit. at 9, 198.

<sup>63</sup> *R v Groom and Others, ex p Cobbold and Others* (1901) 2 KB 157, 161.

<sup>64</sup> *R v Groom and Others, ex p Cobbold and Others* (1901) 2 KB 157, 162.

established by the statute was by way of certiorari. This automatically brought those bodies within the reach of judicial review; a power which, in the case of financial auditors appointed by a Local Government Board, the courts were willing to construe particularly broadly in 1906. Thus in the case of *Roberts*, the Court of Appeal construed its jurisdiction under the Public Health Act 1875 to review 'erroneous' audit decisions as encompassing a power to review errors of both law and fact, bringing the judicial role in such proceedings closer to that of an appeal about the merits of the impugned decision<sup>65</sup>. On the contrary, however, a range of statutes from this time also included provisions of various sorts that were included for the specific purpose of excluding judicial review by the ordinary courts<sup>66</sup>. The judicial construction of such provisions during the relevant timeframe was less activist, in terms of minimising their impact in the interests of preserving judicial oversight, than it would become in later decades. For example, subordinate legislation in the form of the Register of Patent Agents Rules 1889 made by the Board of Trade under authority provided by the Patents, Designs and Trade Marks Act 1888 was treated by the House of Lords 'as if' made in pursuance of that primary Act 'for all purposes of construction or obligation or otherwise'<sup>67</sup>. This is a clear example of secondary legislation rendered immune from judicial review due to the protection afforded by the cloak of parliamentary sovereignty, as Paul Craig has pointed out<sup>68</sup>.

A further reduction in the amenability of certain authorities to review developed through the common law at the beginning of the relevant timeframe. The functions of licensing justices in particular, who had been conferred powers to grant and renew beerhouse licenses upon the reinstatement of that regime in 1869, were characterised as 'administrative' rather than 'judicial'

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<sup>65</sup> *R v Carson Roberts* [1908] 1 KB 407, relying on *R v Haslehurst* (1884) 13 QBD 253.

<sup>66</sup> P. Craig cit. at 22, ch 28.

<sup>67</sup> *Institute of Patent Agents and Others v Lockwood* [1894] AC 347, 361. Paul Craig notes that this decision is difficult to reconcile with the later authority of *R v Minister of Health, ex p Yaffe* [1931] AC 494, but given that it falls outside the relevant timeframe that tension is not explored in any further depth herein. See cit. at 22, 876-877.

<sup>68</sup> P. Craig cit. at 22, 876.



functions in the 1898 case of *Sharman*<sup>69</sup>. This had the very significant effect of rendering their decisions beyond the reach of judicial review – which the courts had decided would only attach to judicial or quasi-judicial functions<sup>70</sup>. There followed several years within the relevant timeframe wherein the licensing justices enjoyed immunity from the reach of prohibition and certiorari as a result, which caused increased resort to mandamus in their place<sup>71</sup>. This immunity was eventually brought to an end, however, by the 1906 Court of Appeal decision in *Woodhouse*<sup>72</sup>. Indeed, *Woodhouse* was part of a broader judicial trend towards enlarging ‘the sphere of judicial and quasi-judicial activities, as a means of enlarging the scope of the writs of prohibition and certiorari’ in cases not involving licensing justices<sup>73</sup>. Thus, by way of illustration, an appeal had decided that the term judicial could in fact refer to two meanings: ‘to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind – that is, a mind to determine what is fair and just in respect of the matters under consideration’<sup>74</sup>. It was relatively clear by this point, therefore, that the reach of certiorari and prohibition would not be determined with reference to the character of whichever authority

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<sup>69</sup> *R v Sharman and Others, ex p Denton* [1898] 1 QB 578, 580.

<sup>70</sup> W. Wade and C. Forsyth cit. at 8, 407-408. Wade and Forsyth explain that the term ‘quasi-judicial’ was used to describe administrative powers which had to be exercised judicially, and thus in conformity with the demands of natural justice (including the right to be heard by an unbiased decision-maker, and so on). Robson heavily criticised ‘the picture conjured up of a quasi-judicial court presided over by a quasi-judge administering quasi-law in quasi-disputes. The quasi-parties give their quasi-evidence; the tribunal finds the quasi-facts and considers the quasi-precedents and quasi-principles. It then applies the quasi-law in a quasi-judicial decision which is promulgated in a quasi-official document and given quasi-enforcement. The members of the tribunal, having concluded their quasi-judicial business, then go out and drink quasi-beer before taking lunch consisting of quasi-chicken croquettes. They then go home to their quasi-wives’. See: W. Robson, *Justice and Administrative Law: A Study of the British Constitution* (1951) at 495-496.

<sup>71</sup> S. Anderson cit. at 15, 501.

<sup>72</sup> *R v Woodhouse and Others* [1906] 2 KB 501.

<sup>73</sup> S. Galeotti cit. at 9, 36.

<sup>74</sup> *Royal Aquarium and Summer and Winter Garden Party Ltd v Parkinson* [1892] 1 QB 431, 452.

was involved but rather with reference to the character of the impugned act or decision<sup>75</sup>. The high watermark in this regard would come in the form of a House of Lords decision shortly after the relevant timeframe wherein Lord Loreburn LC famously ruled that a duty to 'act in good faith and listen fairly to both sides' attached 'upon every one who decides anything'<sup>76</sup>. More will be said about the context of that case in the section of this paper concerning procedural review. For present purposes it is enough to note that it was a fairly stiff, if transitory, corrective to the more reticent judicial developments preceding it.

Tom Cornford's claim that 'neither certiorari nor prohibition seems ever to have been sought against the Crown itself nor against any Crown Servant exercising a power vested in the Crown prior to 1947' is borne out by a thorough search of the relevant law reports<sup>77</sup>. It is therefore necessary to work from the assumption that the Crown itself was considered immune from prohibition and certiorari for the same reasons it was immune from mandamus, which will be considered in the sub-section hereafter<sup>78</sup>. Ministers of the Crown exercising statutory powers, however, appear to have been subject in principle (and in the absence of statutory ouster clauses) to the reach of both prohibition and certiorari<sup>79</sup>.

#### 4.2 Mandamus

Originally, the writ of mandamus was used to restore individuals to offices and liberties which had been unjustly taken from them<sup>80</sup>. By the eighteenth century it had become something more than a writ of restitution given that it was then capable of being deployed for the purpose of compelling the performance of 'a wide range of public or quasi-public duties, performance of

<sup>75</sup> H. Woolf and others (eds.) cit. at 23, 865.

<sup>76</sup> *Board of Education v Rice and Others* [1911] AC 179, 182.

<sup>77</sup> T. Cornford, *Legal Remedies Against the Crown and its Officers Before and After M*, in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (1999) at 242. Cornford's focus on 1947 is because that year saw the passage of the Crown Proceedings Act.

<sup>78</sup> *ibid*, citing *Chabot v Lord Morpeth* (1850) 15 QB 446.

<sup>79</sup> *R v Minister of Health, ex p Yaffe* [1931] AC 494; cf *Institute of Patent Agents and Others v Lockwood* [1894] AC 347.

<sup>80</sup> S. De Smith, *The Prerogative Writs*, 11 Cambridge Law Journal 40 (1951) at 50.

which had been wrongfully refused'<sup>81</sup>. It had developed into a tool of the King's or Queen's Bench by the relevant time frame, where it could be used to compel the discharge of duties incumbent upon both judicial and administrative bodies<sup>82</sup>. Although case law on the writ had grown considerably in number by the mid-nineteenth century, it features much less prominently in the law reports for the relevant timeframe on account of its diminished significance by then. The reasons for that diminishment relate to the reforms of local government which resulted in less dissatisfaction than had pertained in connection with the disorderly system they replaced; to the introduction of various statutory appeals which fulfilled the remedial role the writ had previously attended; and to the decline of freehold offices which had given quasi-proprietary rights to their holders that were enforceable by mandamus<sup>83</sup>. The remedy had also assumed a purely public character which meant that it would not be granted to enforce the private rights of company shareholders, for example, where the proper remedy was adjudged to be an injunction<sup>84</sup>.

As mentioned above, the writ of mandamus was very much at the discretion of the courts during the relevant timeframe. The relevant tests for standing which applied thus shared some of the features explained above with respect to certiorari and prohibition (in cases of latent jurisdiction) in that some form of private right or interest had to be affected, though the duty owed to the applicant had to be of a public nature<sup>85</sup>. Early reports within the relevant timeframe show that judges found it 'difficult to draw the line', but held that mandamus would 'lie on the application of a person interested' in compelling officials to perform a public duty they had refused to perform<sup>86</sup>. In later reports, however, Wright and Bruce JJ took so seriously the requirement that an applicant for mandamus should hold a 'legal specific right' that they agreed to discharge a rule for mandamus primarily because of this technical

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<sup>81</sup> S. De Smith cit. at 80, 51.

<sup>82</sup> *ibid.*

<sup>83</sup> H. Woolf and others (eds.) cit. at 23, 872.

<sup>84</sup> *Davies v Gas and Light Coke Company* [1909] 1 Ch 708.

<sup>85</sup> *R v Secretary of State for War* [1891] 2 QB 326, 335.

<sup>86</sup> *R v Commissioners for Special Purposes of the Income Tax* (1888) 21 QBD 313, 322; 317.

objection<sup>87</sup>. The Lewisham District Board of Works, which had a statutory duty to put into force their powers relating to public health and local government, was thus refused the mandamus it had sought in order to compel the guardians of the poor of Lewisham Union to enforce the Vaccination Acts which applied in their district. Wright J emphasised that the court 'would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance'<sup>88</sup>. However one finds the case of *Cotham* reported the following year, in which mandamus was granted in conjunction with certiorari to the vicar of a parish whose only interest in the matter was that he resided in the place to which a liquor license had been transferred<sup>89</sup>. Likewise, over a decade later, mandamus was granted to a group of individuals for the enforcement of a statutory provision which they had lobbied Parliament to pass into legislation<sup>90</sup>. The court acknowledged that there was inconsistency between *Lewisham* and *Cotham* but determined that it was unnecessary for it to endorse the approach taken in either case, choosing instead to simply decide the case before it in favour of those who sought 'to enforce a clause which was obtained on their own petition'<sup>91</sup>. This would not deter future courts from mechanically citing *Lewisham* with approval on many occasions in later years as an unprincipled basis for restricting access to mandamus<sup>92</sup>. Reports from the relevant timeframe, however, suggest that locus standi generally presented no greater practical barrier to applicants for mandamus than it seems to have done in respect of certiorari.

It was settled principle that while mandamus would issue to a broad range of public authorities, the Crown was not within

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<sup>87</sup> *R v Guardians of the Lewisham Union* [1897] 1 QB 498.

<sup>88</sup> *R v Guardians of the Lewisham Union* [1897] 1 QB 498, 500. See also: *R v Assessment Committee of the City of London Union* [1907] 2 KB 764.

<sup>89</sup> *R v Cotham* [1898] 1 QB 802.

<sup>90</sup> *R v Manchester Corporation* [1911] 1 KB 560.

<sup>91</sup> *R v Manchester Corporation* [1911] 1 KB 560, 563.

<sup>92</sup> W. Wade and C. Forsyth cit. at 8, 588, citing as examples *R v Commissioners of Customs and Excise, ex p Cook* [1970] 1 WLR 450 and *R v Hereford Corporation, ex p Harrower* [1970] 1 WLR 1424.

its reach. These propositions were confirmed in the key case of *R v Secretary of State for War* during the relevant timeframe, wherein an army officer sought mandamus in respect of what he viewed as his entitlements under a royal warrant<sup>93</sup>. The court was clear that mandamus would lie against servants of the Crown as individuals where they had been ‘constituted by statute [as] agents to do particular acts’, but resolute in its ruling that it was ‘beyond question that a mandamus cannot be directed to the Crown or to any servant of the Crown simply acting in his capacity as servant’<sup>94</sup>. Royal warrants being matters of prerogative, and therefore a matter of guarded government discretion, the court refused to recognise mandamus as a tool for their enforcement<sup>95</sup>. This administrative law position differed from the private law position under the law of torts whereby, as Cornford explains, in tort ‘a Crown servant was liable in his personal capacity (e.g. as Lord Halifax) as opposed to his official capacity (e.g. as Secretary of State)’, whereas ‘a Crown servant could be made the subject of mandamus in his official capacity (e.g. as Secretary of State) where the duty sought to be enforced was imposed upon him in that capacity by statute’<sup>96</sup>. The distinction was rationalised by the theory that to grant mandamus against the Crown would be tantamount to the court granting it against itself as another notional part of the Crown<sup>97</sup>. Illogical though this may seem, it was an inexorable consequence of the unitary concept of the Crown that pertained in the UK at the time. The durability of the common law position encapsulated by *R v Secretary of State for War* is well illustrated by the fact that the position was, to the regret of some commentators<sup>98</sup>, unaltered by the Crown Proceedings Act 1947 which for most other purposes made the Crown analogous to a private person.

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<sup>93</sup> *R v Secretary of State for War* [1891] 2 QB 326.

<sup>94</sup> *R v Secretary of State for War* [1891] 2 QB 326, 334.

<sup>95</sup> *R v Secretary of State for War* [1891] 2 QB 326, 336.

<sup>96</sup> T. Cornford cit. at 77, 241.

<sup>97</sup> T. Cornford cit. at 77, 242.

<sup>98</sup> W. Wade and C. Forsyth cit. at 8, 532.

### 4.3 Injunction

As explained earlier, the prerogative writs were not the only means by which administrative actions could be reviewed in UK courts during the relevant timeframe. The equitable remedy of an injunction, and its equitable partner: the declaration, could also be claimed in ordinary civil proceedings against administrative authorities. Injunctions could be prohibitory and thus restrain an authority from committing an unlawful deed, or mandatory (though much less frequently worded in this way) and thus compel an authority to fulfil a public duty. The conceptual overlap between injunctions and the writs of prohibition and mandamus are to this extent quite clear. However the procedure whereby the equitable remedies were claimed in ordinary civil proceedings was different from the procedure for seeking prerogative writs from the Crown Side of the King's or Queen's Bench Division. Thus, although injunctions and declarations might have had similar effects to one or some of the prerogative writs, they could not be claimed in the same set of proceedings as prerogative writs in their own right or as additional or alternative relief<sup>99</sup>. Despite these procedural distinctions, it was possible by the relevant timeframe for any division of the High Court to dispense both common law and equitable remedies, as a result of the amalgamation of court structures discussed in the historical background section of this paper above; whereas beforehand equitable jurisdiction had been restricted to the Chancery benches.

That having been said, the rationalisation of court structures did not eliminate certain jurisdictional differences between suits for equitable relief and those for the prerogative writs<sup>100</sup>. In particular, the rules about whom could apply for equitable relief and against whom the remedies would be granted differed somewhat. The important case of *Boyce* made it clear that private individuals would only be entitled to sue for an injunction in one of the following circumstances:

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<sup>99</sup> M. Westgate, *Declarations, Injunctions and Money and Restitutionary Remedies*, in M. Supperstone, J. Goudie and P. Walker (eds.), *Judicial Review*, 5th ed. (2014) at 616.

<sup>100</sup> *North London Railway Company v Great Northern Railway Company* (1883) 11 QBD 30.

...first, where the interference with the public right [was] such as that some private right of his [was] at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right [was] interfered with, but the plaintiff, in respect of his public right, suffer[ed] special damage peculiar to himself from the interference with the public right<sup>101</sup>.

These exceptions provided only a narrow gateway for individuals to sue on their own part as a means of restraining interferences with general public rights by administrative authorities. Indeed, the *Boyce* formula meant that mandatory injunctions could never be obtained by an individual, only prohibitory ones. The reasoning behind the restrictive approach in *Boyce* has been criticised because of its origins in the law of public nuisance, which is said to have been inapposite given that in the private law context there was no comparable separation between questions of locus standi and questions on the merits of a case<sup>102</sup>.

Nonetheless, if neither of these narrow exceptions were fulfilled an injunction of either negative or positive effect could be sought by the Attorney General in one of two ways. In the first instance, the Attorney General could in theory act of his own motion, *ex proprio motu*, by either filing his own action or intervening in existing proceedings by virtue of his role as guardian of the public interest<sup>103</sup>. In almost all cases, however, the Attorney General was joined in proceedings at the instance of a 'relator' (i.e. an informant). In such 'relator actions', private individuals would effectively request the Attorney General's

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<sup>101</sup> *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114.

<sup>102</sup> P. Craig cit. at 22, 762.

<sup>103</sup> Within the relevant timeframe the closest case in point appears to be *Lord Stanley of Alderley v Wild and Son* [1900] 1 QB 256, wherein the Attorney General intervened in order to file an action against one of the parties praying for a declaration of the rights of the Crown in the matter and seeking an injunction against them to protect Crown property.

consent to use his name to take their case against the perpetrator of a public wrong of some kind. The Attorney thus acted as a jurisdictional filtering mechanism, and one which the courts were firmly unwilling to interfere with. In a 'classic and often cited judgment'<sup>104</sup>, Lord Halsbury LC described the Attorney's role in the following terms:

If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not... [Furthermore,] the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General<sup>105</sup>.

The courts were unwilling to entertain motions from the Attorney General, however, where the public rights he sought to have enforced were not 'rights of the community in general' but 'rights of a limited portion of His Majesty's subjects'<sup>106</sup>. If an Attorney did commence litigation of the former variety, moreover, the judiciary was tenacious as regards its jurisdiction to determine the outcome. That is to say, it was 'for the Attorney-General to determine whether he should commence litigation, but it [was] for the Court to determine what the result of that litigation [would] be'<sup>107</sup>. As such, it was not uncommon for courts to refuse relief sought at the instance of the Attorney General and thus take a

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<sup>104</sup> J. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (1964) at 288.

<sup>105</sup> *London County Council v Attorney General and Others* [1902] AC 165, 168-169.

<sup>106</sup> *Attorney General (on the Relation of the Spalding Union Rural District Council) and the Spalding Rural District Council v Garner and Another* [1907] 2 KB 480, 486.

<sup>107</sup> *Attorney General v Birmingham, Tame and Rea District Drainage Board* [1910] 1 Ch 48, 61.



different view as to the legal position supported by the UK government's most senior legal official of the day<sup>108</sup>.

In terms of which litigants the Attorney General was willing to support in relator actions during the relevant timeframe, it is clear from the reports that his fiat was granted not only to a considerable number of private individuals and groups, but also that it was given to a very broad and numerous range of administrative authorities. An example of the first instance is the *Manchester Corporation* case wherein the Attorney General successfully argued on the relation of a group of Manchester ratepayers that the Manchester Corporation had no power to spend the ratepayers' money by carrying on a goods and parcels service beyond the tramways on which the Corporation had been empowered to do so<sup>109</sup>. A second example of this sort is the *Mersey Railway Company* decision, which enabled the Corporation of Birkenhead (consisting of shareholders in the Mersey Railway Company) to injunct Mersey Railway at the instance of the Attorney General for carrying on business as omnibus proprietors without any express legal power to do so<sup>110</sup>. On the other hand, in so far as relator actions taken at the request of administrative authorities is concerned, a good example is the *Copeland* case wherein an injunction against the owner of private land who had obstructed a pipe maintained by the highway authority for Bromley Rural District Council was sought by the latter by way of a relator action<sup>111</sup>. Indeed it is perhaps of some significance that the courts had become so accustomed to hearing the complaints of public authorities about the infringement of public rights by way of the relator system that they in fact took issue with attempts by such authorities to sue in their own right. Thus, in *Tozer*, the Court of Appeal held that

where there is a public wrong, and where the local authority who have certain special rights to sue in

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<sup>108</sup> For an interesting example, where an interlocutory injunction which had been granted was dissolved after consideration by a differently constituted Court of Appeal, see: *Attorney General (on the Relation of the Monmouthshire County Council and the Same Council v Scott)* [1905] 2 KB 160.

<sup>109</sup> *Attorney General v Manchester Corporation* [1906] 1 Ch 643.

<sup>110</sup> *Attorney General v Mersey Railway Company* [1906] 1 Ch 811.

<sup>111</sup> *Attorney General and Bromley Rural District Council v Copeland* [1901] 2 KB 101.

their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognised way, namely, at the suit of the Attorney-General<sup>112</sup>.

The locus standi of administrative authorities to seek injunctions for the protection of public rights by way of judicial review was therefore subject to the same theoretical restrictions as ordinary citizens. Certain administrative organs of the state did, however, benefit from being ruled beyond the jurisdictional reach of injunctive relief. Parliament, in recognition of its sovereignty, was one such organ and, as such, an action would 'not lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; nor [would any] Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House'<sup>113</sup>. Moreover, as with the prerogative writs, while crown agents could be subject to injunctions the Crown itself could not<sup>114</sup>. Indeed, the *general* 'immunity of public servants for acts done by their official subordinates unless a special mandate, or an adoption of the act purporting to be done on their behalf, is proved' was confirmed during the relevant timeframe<sup>115</sup>.

#### 4.4 Declaration

Uncoercive declaratory judgments were remedial latecomers to the UK court system. They seem to have their origins in the Court of Chancery, which would entertain claims for equitable relief through a procedure known as the petition of right<sup>116</sup>. This involved a petition by the ordinary citizen to the Crown, normally via the Attorney General, which the Crown then voluntarily (and, it would seem, invariably) referred to a court of

<sup>112</sup> *Devonport Corporation v Tozer* [1903] 1 Ch 759, 762. See also: *Tottenham Urban District Council v Williamson and Sons Ltd* [1896] 2 QB 353.

<sup>113</sup> *Bradlaugh v Gossett* (1884) 12 QBD 217.

<sup>114</sup> *Raleigh v Goschen* [1898] 1 Ch 73. Note that the reasoning of Romer J in this case would later be relied upon heavily by Lord Woolf in his seminal judgment on crown liability in *M v Home Office* [1994] AC 377.

<sup>115</sup> *Bainbridge and Another v Postmaster-General and Another* [1906] 1 KB 178.

<sup>116</sup> J. Evans cit. at 12, 476-478.

law for determination<sup>117</sup>. It was in this important respect that declaratory remedies differed from the prerogative writs and injunctions: they were obtainable against the Crown<sup>118</sup>. A declaratory judgment was simply a statement of the law, with no accompanying form of coercive sanction against the impugned party. It appears, however, that for most of the nineteenth century UK judges were loath to grant purely declaratory judgments ‘without doing or directing anything else relating to the right’<sup>119</sup>. By the relevant timeframe, the substantive and procedural availability of purely declaratory judgments had changed quite significantly, but judicial resistance to their use had persisted. Thus, after the amalgamation of the courts of common law and equity in the 1870s had transferred jurisdiction to award declaratory relief to all divisions of the High Court, that statutory power was interpreted so restrictively by the courts that it was essentially robbed of any practical effect<sup>120</sup>. Even after the Rule Committee for the High Court explicitly amended court rules to rectify this position – stating that no actions or proceedings would be open to objection simply because a purely declaratory judgment was sought<sup>121</sup> – the judiciary repeatedly maintained that its jurisdiction should be exercised with ‘great care and jealousy’<sup>122</sup> and ‘extreme caution’<sup>123</sup>. Moreover, it appears that the remedy could only be sought by an individual without joining the Attorney General, as with injunctions, where the *Boyce* criteria discussed above were satisfied (though this does not seem to have been confirmed authoritatively until 1942)<sup>124</sup>.

By the tail end of the relevant timeframe, however, the judiciary was gearing up for a decisive change in its approach to declaratory judgments. The Liberal Party government of the day secured the passage of a Finance Act in 1910 which empowered the Commissioners of Inland Revenue to demand certain

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<sup>117</sup> W. Wade and C. Forsyth cit. at 8, 696-697.

<sup>118</sup> Like injunctions, however, declarations were not available in respect of parliamentary decisions: *Bradlaugh v Gossett* (1884) 12 QBD 217.

<sup>119</sup> *Clough v Ratcliffe* (1847) 63 ER 1016, 1023.

<sup>120</sup> See, for example: *Hampton v Holman* (1877) 5 Ch D 183, 187.

<sup>121</sup> RSC 1883, Order 25, r 5.

<sup>122</sup> *Austin v Collins* (1886) 54 LT 903, 905.

<sup>123</sup> *Faber v Gosworth Urban District Council* (1903) 88 LT 549, 550.

<sup>124</sup> *London Passenger Transport Board v Moscrop* [1942] AC 332, 345.

information from landowners and to penalise subjects who failed to comply with their demands. The Act did not contain any provisions empowering the Commissioners to require a statement from owner-occupiers that would reveal the annual value of their land. Nonetheless, a requirement of this kind was included in a notice delivered to a considerable number of UK subjects by the Commissioners. Unhappy with this ostensibly unlawful demand, a plaintiff by the name of *Dyson* commenced an action against the Attorney General as representing the Crown in September 1910 claiming, inter alia, a declaration that he was under no obligation to comply with the notice<sup>125</sup>. In the following year, the Court of Appeal affirmed the High Court's jurisdiction to judge the matter in spite of arguments from the Attorney General to the effect that such a claim was inappropriate because, he submitted, the proper procedure was to present a defence against any penalty imposed by prosecution and, in addition, that to allow the claim would open the floodgates to 'innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers'<sup>126</sup>. The High Court subsequently ruled in favour of *Dyson*<sup>127</sup>. Hailed as 'turning-point'<sup>128</sup> and a 'breakthrough'<sup>129</sup>, the Court of Appeal's judgment marked a new beginning for the declaratory judgment after it had endured many years of dubious utility. The importance of the judgment was threefold: it enabled citizens to initiate actions for judicial relief in the absence of a cause of action; it obviated recourse to the puzzling technicalities involved in seeking certiorari, and it provided access to justice where no other means of judicially reviewing administrative authorities was possible<sup>130</sup>.

#### 4.5 Summary

The main remedies which operated as gateways to judicial review of administrative actions during the relevant timeframe arguably lacked collective coherence on account of their disparate historical ancestries. As the Law Commission would point out in

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<sup>125</sup> *Dyson v Attorney General* [1911] 1 KB 410.

<sup>126</sup> *Dyson v Attorney General* [1911] 1 KB 410, 413.

<sup>127</sup> *Dyson v Attorney General* [1912] 1 Ch 158.

<sup>128</sup> J. Evans cit. at 12, 479.

<sup>129</sup> P. Craig cit. at 22, 805.

<sup>130</sup> S. Anderson cit. at 15, 505.

later years, the scope and procedural particularities of one remedy may have suited one case except in one respect; but another remedy which was not deficient in that respect may well have been unsatisfactory from other points of view; and, adding to these difficulties, an applicant may not have been able to apply for both remedies in one proceeding<sup>131</sup>. Thus, for example, an applicant seeking a prohibition or certiorari would have had to establish that the authority they sought to challenge was acting judicially, or at least quasi-judicially, whereas no such interpretative restriction on the availability of review would arise on an application for a mandamus, injunction or declaration. Likewise, if an applicant wanted to apply for a prohibition to stop some continuing unlawful conduct (other than in cases where want of jurisdiction was patent); a certiorari to quash an unlawful decision, or a mandamus to compel the performance of a public duty, they would have had to satisfy the theoretically restrictive standing requirements calling for a personal interest in the matter to be shown. If, on the other hand, they had sought an injunction or a declaration at the relation of the Attorney General, those arguments could have been avoided. That being said, the *Boyce* tests for standing which centred on an applicant's private right or special damage would have had to be fulfilled if they were refused by the Attorney General. The significance of these hurdles is highlighted by the fact that, if granted, certiorari would quash (i.e. nullify) an impugned decision, whereas if a declaration was given no such effect could be ensured. Thus cases really were lost and won due to the selection of inappropriate remedies<sup>132</sup>, which meant prospective applicants had to exercise great care in considering the level of coercion in respect of an administrative authority they wanted to seek by way of judicial review. At the low end of the spectrum, a declaration would clarify an applicant's rights while allowing the authority plenty of scope for deciding how to comply with a court's ruling<sup>133</sup>. Certiorari, too, while nullifying a decision, would normally allow a decision maker freedom to reconsider the matter<sup>134</sup>. Prohibition or a

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<sup>131</sup> *Report on Remedies in Administrative Law* (Law Commission No 73, 1976) 15.

<sup>132</sup> *S. De Smith* cit. at 43, 190.

<sup>133</sup> A. Le Seur, *Justifying Judicial Caution: Jurisdiction, Justiciability and Policy*, in B. Hadfield (ed.), *Judicial Review: A Thematic Approach* (1995) at 232.

<sup>134</sup> *ibid.*

prohibitory injunction would be more intrusive, preventing the authority from doing something<sup>135</sup>. Mandamus and mandatory injunctions were of course the most coercive: requiring specific action to be done<sup>136</sup>. It is nonetheless important to note that the theoretical rules of justiciability, standing and amenability laid down in some of the cases explored above were subject to the interpretative inclinations and fidelity to precedent of judges in other cases. Given that, overall, the law reports from this timeframe do not display broad consistency in many respects, generalisations of any greater specificity than those set out above would therefore be misleading.

### 5. The Types of Judicial Review

Due to the conceptual complexity and confusion which surrounds the second perspective through which reported court decisions are analysed in this paper, namely by way of a general overview of the types of judicial review which existed during the relevant timeframe, the following account is, out of necessity, less exhaustive than the foregoing study of remedies. Much of the difficulty in discussing different types of judicial review in the UK in fact stems from the same soil as the collective incoherence of the remedies system, in so far as the historical development of judicial supervision over administrative authorities has been marked by an inherent sense of 'hesitation and self-restraint' borne from the 'rather devious way' in which a series of devices were turned to serve different purposes from their original ones over time<sup>137</sup>. It appears to be largely for this reason that most historical judgments neither clearly label the grounds on which judicial review was conducted nor use perspicuous language to describe the kind of intensity with which a particular sort of administrative act was evaluated. Quite to the contrary, there was and to some extent still is a confusing tendency of both judges and commentators from the English tradition to couch all instances of judicial intervention within the paradigm of *ultra vires* theory<sup>138</sup>. This tendency is of course closely connected to fundamental debates about the

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<sup>135</sup> *ibid.*

<sup>136</sup> *ibid.*

<sup>137</sup> S. Galeotti *cit.* at 9, 187.

<sup>138</sup> S. Galeotti *cit.* at 9, 188.

legitimacy of judicial power over administrative authorities in the UK<sup>139</sup>, but for present purposes it is important only to note by way of background information on the tripartite classification of judicial review used below. In other words, to distinguish between judicial review of ‘jurisdiction’, ‘discretion’ and ‘procedure’ is only one of numerous possible taxonomies; one which has been adopted mainly for the purpose of digestible exposition. The extent to which these categories can be said to have contemporaneously constituted distinct ‘heads’ or ‘grounds’ of judicial review is a question deliberately left open on account of the ambiguity of the historical data available<sup>140</sup>.

### 5.1 Review of Jurisdiction

The concept of jurisdiction simply refers to the authority of a particular decision-maker to decide something<sup>141</sup>. While some jurists prefer to separate talk of *jurisdiction* in respect of judicial actions from talk of *vires* in respect of administrative and subordinate legislative actions, each term refers to the same general idea<sup>142</sup>. By the relevant timeframe, UK courts had developed an important distinction between jurisdictional and non-jurisdictional errors of law and fact<sup>143</sup>. The key difference between them was that jurisdictional errors were essentially unreviewable (unless there was an error of law on the face of the record). In other words, if a matter was decided within the jurisdiction of a particular authority, be it judicial or administrative, it was unamenable to judicial review by the High Court in all but exceptional circumstances. If, per contra, a non-jurisdictional error could be established it would provide an avenue for judicial intervention. The whole theory worked from

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<sup>139</sup> For an unparalleled introduction to this provocative debate, see: C. Forsyth (ed.), *Judicial Review and the Constitution* (2000).

<sup>140</sup> For a penetrating thesis about how such foundational legal constructs develop, see: P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (2015) at 13-24.

<sup>141</sup> J. Evans cit. at 12, 110.

<sup>142</sup> J. Evans cit. at 12, 106.

<sup>143</sup> For fuller accounts and illustrations of the complex jurisdictional debates outlined in this section, see: J. Evans cit. at 12, ch 3; P. Craig cit. at 22, chs 16-17; W. Wade and C. Forsyth cit. at 8, ch 8; M. Elliott and J. Varuhas, *Administrative Law: Text and Materials*, 5th ed. (2017) ch 2.

the assumption that administrative authorities were only ever given power subject to certain conditions. Typically, these conditions would include a requirement to determine whether the statute which conferred power upon the authority permitted it to proceed in the way it proposed to act. Jurists from the relevant timeframe were divided, however, over how to decide whether an authority had decided such preliminary questions in error. One camp argued that the determining factor was the nature of the facts which fell to be determined by way of an inquiry preliminary to the merits of the decision, rather than the truth or falsity of those facts. They also argued that if an authority asked itself the correct preliminary questions at the commencement of an inquiry then its decisions were conclusively within jurisdiction and would therefore be unimpeachable by any court, regardless of whether the authority's decision on the merits was based on completely untenable legal principles or factual mistakes. The second camp differed from the first primarily by its preference for a broader interpretation of the preliminary questions and 'collateral facts' that related to questions of jurisdiction, which accordingly widened the scope of judicial review they viewed as legitimate.

Reports from the relevant timeframe reveal that different judges belonged to different camps, and it is difficult to discern whether either camp was significantly larger than the other for any sustained period of time (though the latter approach, which was more conducive to judicial review, would gain the support of a majority in later years). A strong example of a judgment exhibiting loyalty to the first camp is that of Buckley J sitting on the King's Bench in the *Livingstone* case<sup>144</sup>. The plaintiff was an officer of the Corporation of Westminster, which resolved to abolish his office while providing him with due compensation under powers conferred by the London Government Act 1899. One of the preliminary questions to be determined by the Council was the value of Mr Livingstone's salary and emoluments, so that his compensation could be calculated accordingly. The Council initially granted the amount of compensation Mr Livingstone claimed he was entitled to, but after an audit disallowing part of the compensatory sum on the ground that it did not correctly

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<sup>144</sup> *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109.



reflect his emoluments, the Council rescinded their initial grant and reduced the plaintiff's allowance. When the plaintiff sought to judicially review this decision, Buckley J determined that because the Council had asked itself the correct preliminary question, namely 'what was the amount of the salary and emoluments of the office abolished?', its substantive decision about the value of Mr Livingstone's compensation fell within the Council's jurisdiction<sup>145</sup>. As a result, Buckley J held that the court was 'not competent to review their decision'<sup>146</sup>, subject only to the important moral proviso that the Council had acted 'fairly and honestly'<sup>147</sup>. He summarised this restrictive position memorably as follows:

An analogy, although not a perfect one, may be found in cases where the jurisdiction of a magistrate arises only if a particular fact be found to exist – say, for instance, jurisdiction under the game laws. The magistrate may convict if the bird be a partridge, but not if it be a thrush. It is for the magistrate to decide whether it was a partridge or not. If jurisdiction arises if an offence charged be true in fact, it is for the person whose jurisdiction is invoked to determine the fact<sup>148</sup>.

A telling case involving judges exhibiting loyalty to the approach of the second, less restrictive, camp of jurisdiction theorists is that of Channell, Bray and Sutton JJ in the *Bradford* case<sup>149</sup>. A surveyor of the Newton Abbot Rural District Council had been authorised by the justices of the Newton Abbot petty sessional division to take materials from a five acre plot of land. The Highway Act 1835 under which this authorisation had been made provided that the justices could authorise highway

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<sup>145</sup> *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109, 118.

<sup>146</sup> *ibid.*

<sup>147</sup> *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109, 119.

<sup>148</sup> *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109, 118-119.

<sup>149</sup> *R v Bradford* [1908] 1 KB 365.

surveyors to gather materials and so on as required for the purpose of repairing the highways, so long as such lands were not gardens, yards, avenues, lawns, parks, paddocks or enclosed plantations. The authorisation at the heart of the *Bradford* case permitted a surveyor to take materials from a place known as Grange Quarry, which formed part of a permanent pasture field containing 'fruit and other ornamental trees'<sup>150</sup>. The resident of this land, Mrs Hare, sought certiorari to quash the justices' decision because, among other things, it was made in respect of land which was a park. The justices had determined that the land was not a park and, moreover, submitted that whether particular land is a park or not was 'a question of fact which [had to be] finally decided by some tribunal or other, and it was probably intended by the Act that the local justices, who presumably would be well acquainted with the spot, should be that tribunal, rather than another Court which was not so acquainted'<sup>151</sup>. However Channel J was wholly unpersuaded by their submission, holding that:

...the question whether a place is a park or not is a matter which is preliminary to the exercise of the justices' jurisdiction, and one which it is not for the justices to finally determine. And if the place is a park in fact, they cannot give themselves jurisdiction by finding that it is not a park. That being so, the question remains whether the land in which the quarry is situated is in fact a park or not, and from the physical description that has been given of it I think we are bound to come to the conclusion that it is a park<sup>152</sup>.

The facts of the *Bradford* case clearly illustrate how it would not be possible for an authority to activate its own jurisdiction by way of a factual error when reviewed by judges belonging to the second camp of jurisdiction theorists. The concept of jurisdiction thus seems to have enabled a results-based procedure at times;

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<sup>150</sup> *R v Bradford* [1908] 1 KB 365, 366.

<sup>151</sup> *R v Bradford* [1908] 1 KB 365, 367-368.

<sup>152</sup> *R v Bradford* [1908] 1 KB 365, 372.

whereby a judge of the High Court could choose to intervene in a particular case by determining that an issue was non-jurisdictional, or decline to intervene by defining an issue as jurisdictional. The uncertainty this must have caused UK subjects does much to discredit those courts with hindsight, though they were perhaps doing their best to strike a conceptual balance between judicial control and administrative autonomy within the confines of a complex jurisprudential heritage<sup>153</sup>. Moreover, it is quite possible that many judges believed they were drawing genuine analytical divisions rather than devising instrumental constructs<sup>154</sup>.

## 5.2 Review of Discretion

The concept of discretion in UK law has historically been used to refer to the power of an administrative authority to choose between different options while subject to certain judicially enforceable common law constraints. Like most other aspects of UK law during the relevant timeframe, these constraints were neither fixed nor particularly systematic. Nonetheless, it is possible to identify tentatively at least five kinds of common law constraint on the exercise of administrative discretion from the reports which, although they overlap to some degree, might be expressed in modern parlance as follows: a presumption against delegation; a presumption against fettering; a rule against improper purposes; a requirement of relevancy; and a requirement of reasonableness and (in a rather loose sense) proportionality.

Each constraint can be introduced by reference to illustrative judicial precedents. With respect to the presumption against delegation, the case of *High v Billings* is apposite<sup>155</sup>. The case concerned a delegation of power by the Hackney District Board of Works to one of its surveyors. The Board had authorised the surveyor to grant applications for house drainage, which he duly did. When, however, an application was granted to lay a drain under several properties, the owner of one of them objected to it as a nuisance and claimed that the Board had not properly

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<sup>153</sup> P. Craig cit. at 140, 34-35.

<sup>154</sup> P. Craig cit. at 22, 472.

<sup>155</sup> *High v Billings* (1903) LT 550.

exercised its discretion. It was claimed that by delegating its discretion to the surveyor on a very general basis the Board had failed to consider each drainage pipe application on its own merits and thereby acted contrary to the common law presumption against delegation. Lord Alverstone CJ thus ruled that the Board could not 'delegate generally their jurisdiction without judgment upon the orders that ought to have been made'<sup>156</sup>. Simply stated, the presumption was that where legislation empowered a particular decision-maker to exercise discretion, the decision-maker was not normally permitted to pass that power to another.

The presumption against fettering was raised in the *Stepney* decision<sup>157</sup>. A Council for the Metropolitan Borough of Stepney had calculated compensation for an individual by the name of Mr Jutsom, whose vestry office had been abolished under powers conferred upon the Council by statute. The Council calculated Mr Jutsom's compensation in accordance with a regular practice of the Treasury when compensating redundant civil servants. The Treasury's practice in respect of individuals who did not devote their whole time to the duties of their office – as was the case in respect of Mr Jutsom, who had practiced as a solicitor in addition to his vestry office duties – was to deduct a quarter from the compensatory figure which would otherwise have been payable. Mr Jutsom sought a writ of mandamus from the King's Bench to compel the Council to exercise its discretion with reference to the particular facts of his case, rather than by the application of a rigid non-statutory rule. A mandamus was granted by the court because the Council had fettered its discretion in this way. Darling J worded his opinion in these unequivocal terms:

I do not think that the council really did consider the matter at all for themselves...They acted upon what the Treasury told them was their practice. I do not think that they acted, therefore, upon any real judgment of their own. They borrowed a measure from the Treasury, and they tried to measure what they were to give as compensation with that,

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<sup>156</sup> *High v Billings* (1903) LT 550, 552.

<sup>157</sup> *R v The Mayor, Aldermen and Councillors of Stepney* [1902] 1 KB 317.

without applying their own judgment to what they were to give at all<sup>158</sup>.

*Denman* furnishes a clear demonstration of the rule against improper purposes<sup>159</sup>. The Westminster Corporation had been empowered by statute to compulsorily purchase land for the purpose of widening streets. The Corporation purported to use this power in order to obtain property in a prime London location from the Denman company, with the intention of selling it to a syndicate of property developers. Buckley J was persuaded to grant injunctions restraining the Corporation from doing this, however, on the ground that it would not be exercising its statutory power for the purpose it was given<sup>160</sup>.

The requirement of relevancy had two constraining common law dimensions: a requirement on legal decision-makers to take all relevant considerations into account when exercising their discretion, and a correlate requirement to leave all irrelevant considerations out of account. In a case about an individual by the name of Mr Robinson, for instance, the latter requirement to leave all irrelevant considerations out of account is apparent from the reasoning of the judges<sup>161</sup>. Thus, granting a liquor license to Mr Robinson with reference to the irrelevant fact that he normally superintended for twelve hours per day the premises which were being considered for licensing, taking his meals there and so on, was immaterial. The relevant statutory requirement was that he had to actually *reside* on the premises, which he did not. Lawrance and Channell JJ therefore agreed to quash the relevant authority's decision to grant a license in Mr Robinson's favour by certiorari and ordered by mandamus that his application be reheard (while cognisant that it remained likely to be refused)<sup>162</sup>.

Finally, administrative discretion during the relevant timeframe was subject to a relatively novel standard of reasonableness and (in a rather loose sense) proportionality<sup>163</sup>. Its

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<sup>158</sup> *R v The Mayor, Aldermen and Councillors of Stepney* [1902] 1 KB 317, 323-324.

<sup>159</sup> *J L Denman & Co Ltd v Westminster Corporation* [1906] 1 Ch 464.

<sup>160</sup> *J L Denman & Co Ltd v Westminster Corporation* [1906] 1 Ch 464, 476.

<sup>161</sup> *R v Justices of Manchester* [1899] 1 QB 571.

<sup>162</sup> *R v Justices of Manchester* [1899] 1 QB 571, 574-576.

<sup>163</sup> For useful information on the context of these cases, see S. Anderson cit. at 15, 512-521.

principal promulgators seem to have been Lord Halsbury LC, Lord Russell CJ and Lord Macnaughten in the three celebrated cases of *Sharp v Wakefield*, *Kruse v Johnson*, and *North Western Railway*. In the first case, Lord Halsbury LC said this:

“discretion” means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion ... according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself<sup>164</sup>.

In the second case, in respect of by-laws, Lord Russell CJ considered a number of authorities which informed his view that a court could intervene on grounds of unreasonableness if it could be shown that a by-law was ‘manifestly unjust, capricious, inequitable, or partial in its operation’<sup>165</sup>. Moreover, in describing the limits of what was reasonable and therefore lawful in the exercise of the power to make by-laws, Lord Russell referred to ‘such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men’<sup>166</sup> – a test in which, as Stephen Sedley has perceptively identified, ‘it is not entirely fanciful to see the embryo of a doctrine of proportionality’<sup>167</sup>. In the third case, Lord Macnaughten confidently ruled that:

It is well settled that a public body invested with statutory powers ... must take care not to exceed or

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<sup>164</sup> *Sharp v Wakefield* [1891] AC 173, 179.

<sup>165</sup> *Kruse v Johnson* [1898] 2 QB 91, 94-95.

<sup>166</sup> *Kruse v Johnson* [1898] 2 QB 91, 99-100.

<sup>167</sup> S. Sedley cit. at 4, 68. For a persuasive argument to the effect that the UK has had a concept akin to proportionality, though less structured than its continental counterparts, from the late sixteenth century onwards, see: P. Craig, *Proportionality and Judicial Review: A UK Historical Perspective*, in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law, European and Comparative Perspectives* (2017).

abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably<sup>168</sup>.

Moreover, shortly after the relevant timeframe Lord Macnaughten invalidated a decision of the New South Wales Public Service Board regarding the value of a retirement gratuity on account of his contention that the Board's discretion had to be exercised 'reasonably, fairly, and justly'<sup>169</sup>. There can be no doubt, therefore, that some courts were willing to vigorously apply normative moral standards defined by the common law to the conduct of administrative authorities during the relevant timeframe, ostensibly undeterred by the fact those standards lacked any specific legislative basis.

### 5.3 Review of Procedure

The notion that adjudicative procedures should conform to a standard of 'natural justice' during the relevant timeframe was given effect in the UK primarily through the application of two important judicial principles: that parties to a judicial determination should be given adequate notice and a fair hearing (*audi alteram partem*) and that a judge should be disinterested and unbiased (*nemo iudex in causa sua*).

At the beginning of the relevant timeframe, the right to a fair hearing with adequate notice was applied in the case of *Hopkins*, in which the Court of Appeal ruled that where a building had been erected contrary to the by-laws of the Smethwick Local Board of Health, the Board could not exercise its statutory power to demolish that building without giving the owner notice and an opportunity to be heard<sup>170</sup>. Likewise, a school master who was going to be dismissed by a board of vicars was able to have his dismissal provisionally injunctioned because this 'elementary principle of justice' had been neglected<sup>171</sup>. Mr Fisher had not been informed of the charges against him or provided with an

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<sup>168</sup> *Mayor of Westminster v London and North Western Railway Company* [1905] AC 426, 430.

<sup>169</sup> *Williams v Giddy* [1911] AC 381, 385.

<sup>170</sup> *Hopkins and Another v Smethwick Local Board of Health* (1890) 24 QBD 712, 715.

<sup>171</sup> *Fisher v Jackson* [1891] 2 Ch 84, 94.

opportunity of answering them<sup>172</sup>. At the end of the relevant timeframe, moreover, Lord Loreburn LC delivered a sweeping statement of the principle in the often cited *Board of Education v Rice* case which was briefly referred to earlier<sup>173</sup>. It was in this case that he said any official determining matters of law 'must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything'<sup>174</sup>. Significant though this judicial attitude to the reach of the principle was, it should be noted that it was heavily watered down a few years later in the case of *Arlidge*; wherein it was held inapplicable to statutory inquiries, which were a newly constituted form of administrative procedure<sup>175</sup>. Some commentators credit the creeping in of Diceyan influence by this time for the increase in judicial deference which the change in *Arlidge* came to represent<sup>176</sup>.

The principle that no man should be a judge in his own cause arose in judicial review cases of two main sorts, which reflect the modern-day framework for understanding it to a fair extent<sup>177</sup>. The first sort of case would typically concern a decision-maker who could be shown to have a pecuniary interest in the outcome of decision. The case of *Gaisford* is a good example<sup>178</sup>. Mr Gaisford, who was both a magistrate and a ratepayer in the relevant parish, suggested in his capacity as a ratepayer at a parish meeting about highway matters that legal proceedings should be taken against the applicant in respect of materials the latter had deposited on a highway. After a summons was issued to the applicant, he attended a hearing where the very magistrate who had moved to initiate the proceedings against him, Mr Gaisford, was sitting on the court responsible for determining his case. The Queen's Bench therefore granted certiorari to quash the magistrate's order for the applicant's deposited materials to be removed and sold, because it was

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<sup>172</sup> *ibid.*

<sup>173</sup> *Board of Education v Rice* [1911] AC 179. The first instance decision is reported at [1909] 2 KB 1045, and the Court of Appeal decision at [1910] 2 KB 165.

<sup>174</sup> *Board of Education v Rice* [1911] AC 179, 182.

<sup>175</sup> *Local Government Board v Arlidge* [1915] AC 120.

<sup>176</sup> G. Drewry cit. at 33, 18.

<sup>177</sup> P. Craig cit. at 22, ch 14.

<sup>178</sup> *R v Gaisford* [1892] 1 QB 381.



well-known law that the same person shall not act both as accuser and judge; and also that a man shall not act as a judge in a case in the decision of which he has a pecuniary interest, unless relieved by statute; the fact that a man has even the slightest pecuniary interest operates to disqualify him from adjudicating upon a case<sup>179</sup>.

The second sort of case would generally involve a decision-maker who could be shown to have some other bias or predilection towards the outcome of their decision as a result of institutional affiliations. The test applied in such cases was whether the circumstances gave rise to a ‘real likelihood of bias’<sup>180</sup>. The Court of Appeal held that this test was satisfied in the *Justices of Sunderland* case, for example. The justices involved were also members of a borough council; a council which had agreed, in essence, to orchestrate the transfer of a liquor license in force in respect of a hotel it owned. The justices, having participated in this agreement, had subsequently heard and granted a licensing application made by the very company which had agreed to pay the council a sum of money if its liquor license was successfully transferred. Having considered ‘whether, under the circumstances, there was a real likelihood that these justices, by reason of the part which they took in the negotiations for the agreement, would have a bias in favour of the application for a license’, the King’s Bench concluded that there was indeed such a likelihood and therefore quashed it by issuing a writ of certiorari<sup>181</sup>.

#### 5.4 Summary

The foregoing analysis makes it quite plain that the types of review which an applicant could seek to have applied to administrative decisions during the relevant timeframe were judicial creations. It is equally clear that they were conceptually limited to neither legislative intent nor private interests, given that they also included certain rules grounded in abstract notions of

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<sup>179</sup> *R v Gaisford* [1892] 1 QB 381, 384.

<sup>180</sup> *R v Justices of Sunderland* [1901] 2 KB 357, 364.

<sup>181</sup> *R v Justices of Sunderland* [1901] 2 KB 357, 372.

justice. This much underlines the point that courts have historically played a very significant role in the development of substantive administrative law in the UK. Were it not for a certain level of judicial audacity and moral leadership, as is evidenced in some of the reports discussed above, it is entirely possible that administrative power in the UK might have been exercised in pursuance of rather different conceptual goals.

## **6. The Frequency of Judicial Review**

It was possible in the course of the research underpinning this report to undertake some quantitative analysis on the frequency of administrative law cases heard by UK courts during the relevant timeframe. This quantitative analysis was, however, necessarily crude in nature and must be heavily caveated due to the following significant methodological limitations.

First, annual figures were aggregated from six series of law reports which were identified as being likely to contain relevant reports over the period of time under study. In the absence of an 'official' series of law reports in the UK, the most authoritative privately published reports available were examined<sup>182</sup>. It is possible that certain cases were reported by more than one of these publishers<sup>183</sup>, but due to limited time and resources it was not possible to sift out any redundant results of this kind. It is also possible that cases are omitted which did not feature in any of these particular series and, indeed, cases which were not reported anywhere at all. Paul Craig has noted in a different context that such omissions might exist because it may have been felt at the time that a case raised no novel points of law and failed to qualify for reporting as a result, despite being important for the present purpose of accurately depicting the incidence of judicial review<sup>184</sup>.

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<sup>182</sup> Namely four series of the Law Reports by the Incorporated Council of Law Reporting for England and Wales (the Appeal Cases series, the King's/Queen's Bench Division series, the Chancery Division series, and the Probate/Family series), together with the All England Law Reports Reprint series and the All England Law Reports Reprint Extension series.

<sup>183</sup> The risk of duplication is happily limited in this context to that which might exist between the four series by the Incorporated Council of Law Reporting for England and Wales, and the two series published by the All England Law Reports.

<sup>184</sup> P. Craig cit. at 140, 28.

Second, the historic law reports discussed above do not themselves attempt to distinguish between administrative and non-administrative law cases. Given that the overall number of cases reported therein between 1890 and 1910 is in the tens of thousands, it was again impractical to conduct a manual sifting exercise. It was therefore necessary to develop several batches of search terms with the aim of returning search results from within the relevant law reports which would exclude non-administrative law cases. A broad, potentially over-inclusive batch of search terms ('Batch A') was refined in several iterations by removing search terms which seemed – on the basis of some necessarily cursory checks – to skew the results by returning predominantly non-administrative law cases. A narrow, potentially under-inclusive batch of search terms ('Batch B') was refined using the same technique. Batch A was broad in the sense that it included, for instance, the names of various bodies which would have been subject to administrative law at the time<sup>185</sup>. It thus included terms likely to return figures for collateral challenges to administrative authorities, although this inevitably increased the risk of some anomalous results<sup>186</sup>. Batch B was narrow in the sense that it was restricted, for the most part, to the names of administrative law remedies and the grounds for judicial review recognised at the time<sup>187</sup>.

As expected, Batch A returned a much larger set of results than Batch B. Also as expected, it was clear that Batch A contained a number of anomalous results and could only be taken to reflect a rather inflated depiction of the incidence of administrative law cases. Likewise, Batch B seemed to reflect a deflated depiction. In the absence of sufficient time and resources to manually sift the results at this third stage of the quantitative research methodology, it was decided that the most practical solution was to take an average of the number of results returned by both batches of search terms and to rely on that number as the *best possible estimate* of administrative law cases reported each year. The word *estimate* in this phrase makes it clear that the quantitative analysis which follows is based on imperfect

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<sup>185</sup> For example: commissioners, inspectors, tribunals, boards, inquiries, corporations, and so on.

<sup>186</sup> On collateral challenges, see: P. Craig cit. at 140, 27-28.

<sup>187</sup> For example: certiorari, mandamus, prohibition, natural justice, and so on.

calculations, while the words *best possible* are indicative of the relatively thorough yet time- and resource-limited methodology that lies behind the numbers involved in the calculations.

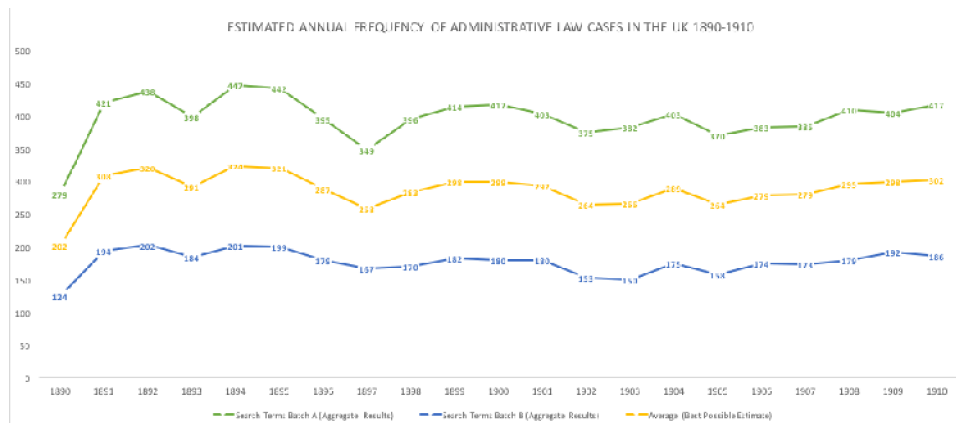


Figure 1

The above graph (Figure 1) summarises the findings of this quantitative enquiry. The aggregate search results – that is, the sum of the number of search results returned for each of the six series of law reports identified above – are shown for Batch A in green and Batch B in blue. The average of these results is represented by the yellow line on the graph. Figure 1 illustrates that although the volume of results returned for each batch of search terms varied considerably, the same general trends in frequency are clearly discernible (which is only partially due to overlaps in the relevant search terms). This reinforces the reliability of the average results to some extent, and the brief commentary below focuses on them accordingly. For ease of reference, the average results – representing the best possible estimate of the annual frequency of administrative law cases in the UK between 1890 and 1910 – are isolated in a graph of their own (Figure 2) below:

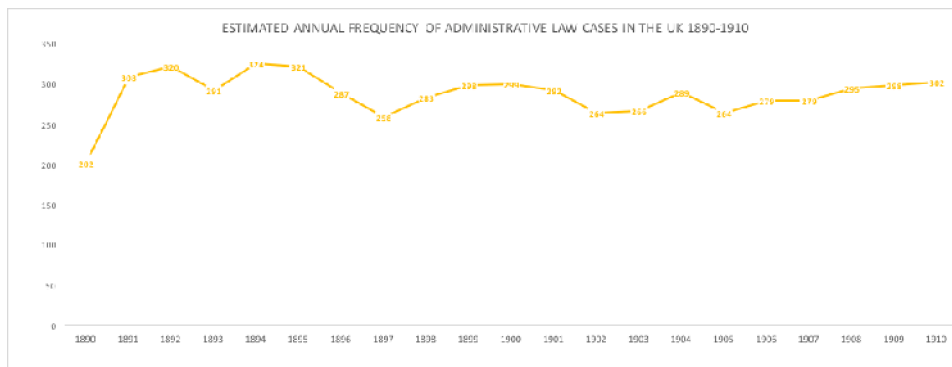


Figure 2

The most striking feature of this data is its demonstration of the generally stable incidence of administrative law cases throughout most of the 20-year period studied. Apart from the fairly significant initial jump in case numbers between 1890 and 1891, the graph does not tell a story of gradually increasing frequency in administrative law cases but rather one of relative stability.

A related point of interest arises from the data, namely its comparative similarity to modern-day data on the frequency of administrative law cases in the UK. When drawing a comparison between this historical time period and the present day, however, certain contextual factors should be borne in mind. Foremost among these factors is the considerable growth in population numbers that has taken place within the UK, which may reasonably account for a relative increase in administrative law case numbers<sup>188</sup>. Moreover, modern figures should be screened so as to remove the number of applications for leave to apply for judicial review, given that historical figures relating to the UK landscape prior to 1933 deal solely with the law reports available for substantive judicial review hearings (which were subject to a very different procedure that placed the onus on respondents to show cause as to why a provisionally granted remedy should not be made final)<sup>189</sup>. The requirement of leave to apply for judicial review which was introduced in 1933<sup>190</sup> has resulted in much

<sup>188</sup> P. Craig cit. at 140, 28.

<sup>189</sup> A. Le Seur and M. Sunkin, *Applications for Judicial Review: The Requirement for Leave*, Public Law 102 (1992).

<sup>190</sup> Administration of Justice (Miscellaneous Provisions) Act 1933.

fewer substantive hearings of the sort represented in the graph above. For example, while in 2011 there was over 11,000 applications for leave (or 'permission' as it now called in England and Wales<sup>191</sup>) to apply for judicial review, only about 1,200 of those cases were granted permission to proceed to a substantive hearing; of which fewer than 400 actually reached the hearing stage on account of out-of-court settlements<sup>192</sup>. Taking these factors properly into account, the overall average of 286 administrative law cases per year illustrated by this graph at the very least corroborates Paul Craig's claim that it is not 'self-evident' that judicial review was less used in the past than it is now<sup>193</sup>. Indeed, the numbers appear to be markedly similar.

One final observation remains to be made, based on a quantitative analysis of the law reports adverted to above using a separate and distinct set of search terms. This set of search terms was devised specifically in order to discover the extent to which Dicey and his controversial legal scholarship on constitutional law was referred to by UK courts between 1890 and 1910. A graph is not necessary to illustrate the frequency of results on an annual basis as the overall number of results is so limited, totalling a 20-year aggregate of 91. The vast majority of these results, moreover, were of two anomalous types. First, many of the results returned concerned references by the courts to Dicey's book on private international law<sup>194</sup>. The courts certainly treated this work with respect, commenting for example that a particular matter of construction appeared 'to be well summed up in Mr. Dicey's work on Conflict of Laws'<sup>195</sup>, but never with the level of deferential favour which his earlier constitutional law scholarship would later attract among judges down the decades. Second, a fairly large proportion of results concerned Dicey's personal appearance in cases as senior counsel<sup>196</sup>. As was the case in respect of his private

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<sup>191</sup> Civil Procedure Rules, Pt 54.4.

<sup>192</sup> H. Woolf and others (eds.) cit. at 23, 29.

<sup>193</sup> P. Craig cit. at 140, 28.

<sup>194</sup> A. Dicey, *A Digest of the Law of England with reference to the Conflict of Laws* (1896); A. Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, 2nd ed. (1908).

<sup>195</sup> *Harding v Commissioners of Stamps for Queensland* [1898] AC 769, 774.

<sup>196</sup> Dicey did not appear as junior counsel in any cases within this date range given that he took silk at the very beginning of 1890.

international law scholarship, the weight of Dicey's representations as senior counsel do not appear to have attracted particular preferment from the judiciary of this era. In the charitable tax allowance case of *Pemsel*, for example, among Dicey's (jointly prepared) submissions was the procedural contention that mandamus ought not to lie against the respondents as Crown servants; his argument being that the proper remedy lay by way of petition of right<sup>197</sup>. Lord Herschell dismissed that argument, however, on the basis that mandamus was not sought in order to compel the payment of money to which the applicant was allegedly entitled, which would be recoverable by petition of right, but to compel the issuance of an allowance and certificate which was needed in order to maintain a petition of right<sup>198</sup>.

Perhaps most notably, Dicey's revered work on the constitution<sup>199</sup> appears to have been cited and expressly considered only once during this time period. In the case of *Wise v Dunning*<sup>200</sup>, which determined that jurisdiction existed to bind over a public speaker who indirectly incited breaches of the peace, counsel for the appellant drew the court's attention to Dicey's constitutional law book in an attempt to further the argument that no jurisdiction existed in the circumstances of the case<sup>201</sup>. Although Dicey did indeed claim that there was inconsistency between certain judicial authorities, Lord Alverstone CJ ruled that having 'closely examined' them for himself he was unable to agree with Dicey's opinion (though his ruling was prefaced by generally respectful and complimentary language about the 'very learned lawyer and writer')<sup>202</sup>. This singular and ultimately discredited reference, together with the largely anomalous references discussed above, suggests that during the relevant timeframe the development of judicial standards of administrative law in the UK – quite apart from other areas such as private international law –

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<sup>197</sup> *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 536.

<sup>198</sup> *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 569.

<sup>199</sup> A. Dicey cit. at 34.

<sup>200</sup> *Wise v Dunning* [1902] 1 KB 167.

<sup>201</sup> *Wise v Dunning* [1902] 1 KB 167, 172.

<sup>202</sup> *Wise v Dunning* [1902] 1 KB 167, 174.

was in fact very infrequently, it at all, explicitly influenced by Diceyan jurisprudence.

## 7. Conclusion

While an attempt to recapitulate the full findings of this report in any detail would be lengthy and repetitious, it is worthwhile to note some general observations which emerge from its coverage of the context, reach, types and frequency of judicial review between 1890 and 1910. The first of these observations is that whereas the remedies for judicial review were clearly characterised by bespoke rules and procedures that made them relatively distinct and intelligible, the types of review that could be argued in UK courts were rather hazily defined and applied; sometimes with reference to a specific doctrine, at other times under the broad rhetoric of *ultra vires* theory. In addition, the tendency of courts to formulate jurisprudential constructs which enabled them to decide cases according to their own preferences rather than with reference to clear principles is discernible in a number of areas. The judicial choice involved in determining whether a matter was administrative or judicial for the purposes of granting access to the writs of prohibition and certiorari highlights this point as much as the judicial choice involved in deciding whether to classify matters as either jurisdictional or non-jurisdictional. The apparent lack of structure, certainty and consistency engendered by these constructs, however, does not mean that there was no body of substantive law at all that could be properly termed administrative. The law reports are replete with examples of judicial attempts to define and refine general principles of law, in some instances more indeterminate than others, for the purposes of both facilitating and controlling administrative authorities. In this regard, the law reports manifestly confirm the historically 'Janus-like' nature of judicial review in the UK<sup>203</sup>. In other words, they do not support the idea that judges were committed to *restraining* administrative actions with reference to independently formed moral precepts and nothing else. Although it is true that this was undoubtedly their motivation at times (which the cases on unreasonableness and

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<sup>203</sup> P. Craig cit. at 140, 62-65.



natural justice amply demonstrate), judicial constructs were also devised and modified in order to *effectuate* the administrative arrangements contested before them. The rule against improper purposes well exemplifies this point. Legal theories centred on Diceyan foundations (and indeed other unitary schools of thought) which fail to acknowledge this duality of purpose should be treated with caution. The empirical evidence provided by historical law reports, disorganised and heterogeneous though it may be, is a heavy counterweight to many of their claims.